

Wetland Labels for Food Security Act Webinar

Questions and Answers

1. Will this information be supported by the 6th edition of NFSAM?

The information in the webinar was taken from the NFSAM 5th Edition, Amend. 4, January 2017. It is current policy. The 6th Edition is still in preparation at this time. I do not expect the information in the webinar will become outdated upon release of the 6th Edition, but the references to policy in the NFSAM (i.e. Part 514) will likely change.

2. If something was cropped only prior to the 1930's but has been idle for 70+ years (not in conservation program), is it still considered PC?

Maybe. I assume you are referring to a former wetland being cropped. Here is the definition of PC in the regulations (7 CFR Part 12.2 (8)):

Prior-converted cropland is a converted wetland where the conversion occurred prior to December 23, 1985, an agricultural commodity had been produced at least once before December 23, 1985, and as of December 23, 1985, the converted wetland did not support woody vegetation and met the following hydrologic criteria:

- (i) Inundation was less than 15 consecutive days during the growing season or 10 percent of the growing season, whichever is less, in most years (50 percent chance or more); and
- (ii) If a pothole, playa or pocosin, ponding was less than 7 consecutive days during the growing season in most years (50 percent chance or more) and saturation was less than 14 consecutive days during the growing season most years (50 percent chance or more).

So if the area cropped prior to the 1930s did not support woody vegetation on 12/23/1985 and met the hydrologic criteria, it would be PC. Note the definition in the NFSAM (514.30 A.) is slightly different – instead of “did not support woody vegetation” it says “was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained....)

3. In regards to FW and FWP requirements, I have heard everyone say the same as you did that in non-pothole, playa, pocosin areas it needs to have 15 days INU for both of them or the 7 INU or 14 saturated for a pothole, playa or pocosin. Unless I have read 7CFR 12.2-4/5 wrong that notion is wrong. According to number 5, for a FWP, it doesn't matter what landform if it doesn't have a commodity crop history. It all falls under the 7 days INU or 14 days saturated. Am I reading that wrong? I don't believe I am.

Perhaps I miss-spoke or perhaps you heard wrong, but you are correct and the written parts of the webinar are correct. Refer to the Notes on Slide 25 and the text on Slide 36.

4. CWTA and CWIL regain eligibility for Crop Insurance only? Not all programs?

Yes. Refer to the regulations at 7 CFR Part 12.13 - *Special Federal crop insurance premium subsidy provisions* and the NFSAM Part 514 Subpart H - *Labels: Exemptions Due to the Relinking of Crop Insurance to Conservation Compliance*.

5. Do we know a date of the new NFSAM?

No, I do not know an estimated date the NFSAM 6th Edition will be released at this time.

6. What would constitute an abandoned FWP?

See Slide 28 and NFSAM 514.33 – Abandonment. Per the regulations at 7 CFR Part 12.33(c):

(c) Abandonment is the cessation for five consecutive years of management or maintenance operations related to the use of a farmed wetland or a farmed-wetland pasture. Unless the criteria for receiving an exemption under §12.5(b)(1)(iii) are met, such land is considered to be abandoned when the land meets the wetland criteria of §12.31.

Some examples for FWP would be if drain tile or drainage ditches were not cleaned out regularly and became plugged up, allowing hydrology to return or allowing woody vegetation to grow back. However, note the “related to the use” part of the definition. Per regulations at 7 CFR 12.30 (c)(6), if a person had a certified wetland determination with an area labeled FWP and is in compliance, “as long as the area is devoted to the use and management of the land for production of food, fiber, or horticultural crops, a certification made under this section will remain valid and in effect until such time as the person affected by the certification requests review of the certification by NRCS.”

7. For PC label the area was capable of producing an agricultural commodity (i.e., did not support woody vegetation and was sufficiently drained to support production of an agricultural commodity)

On December 23, 1985, correct. See Notes on Slide 25.

8. If a cover crop is planted on a field that is considered a wetland, is grazing the cover crop (before it makes mature seed) considered harvesting the crop?

Not enough information is provided in this question to formulate an answer. A field that is considered a wetland could be W, WX, FW, FWP, etc. I think this question relates to the discussion of annual cover crops on WX. There is no specific policy guidance on grazing cover crops on WX. See NFSAM 514.11 for more information on WX.

9. In the arid west, springs (meeting wetland criteria) are developed for livestock watering. Many of these sites are located in areas where you could not produce a commodity crop even if you wanted to. Would we use WX as a label on this scenario?

If you had to make a determination for eligibility purposes, WX would be an appropriate label. The Criteria in Conservation Practice Standard 574 (Spring Development) used to require a certified wetland determination to be made. This requirement was in error and has been removed. Producers do not need to complete a new AD-1026 for manipulations in wetlands that have been evaluated by NRCS and NRCS has determined production of an agricultural commodity will not be made possible.

10. What label do you apply to WRP/WRE sites?

It should never be necessary to apply a label to WRP/WRE sites. Per ACEP Manual 528.105 A. (3) *Land Eligibility*:

For the purposes of enrollment in ACEP-WRE, a “certified” or “official” wetland determination, as defined by the National Food Security Act Manual (NFSAM), is not required to determine eligibility.

11. How is a current producer affected who was not the producer when a conversion occurred?

FSA is responsible for determining eligibility, so any answer NRCS provides would only be speculation. In general, commodity crop production on a converted wetland results in non-compliance. Per regulations at 7 CFR Part 12.4 Determination of ineligibility:

(a) Except as provided in §§12.5 or 12.13, a person shall be ineligible for all or a portion of USDA program benefits listed in this section if: ...

(2) The person produces an agricultural commodity on a wetland that was converted after December 23, 1985

and

(f) *Determination of ineligibility.* For the purpose of paragraph (a) of this section, a person shall be determined ... to have produced an agricultural commodity on converted wetland ... if:

(1) NRCS has determined that—

...

(ii) All or a portion of the field is converted wetland; and

(2) FSA has determined that the person is or was the owner or operator of the land, or entitled to share in the crops available from the land, or in the proceeds thereof; and

(3) With regard to the provisions of paragraph (a)(1) and (a)(2) of this section, FSA has determined that the land is or was planted to an agricultural commodity or was designated as conservation use during the year for which the person is requesting benefits.

Per NFSAM 514.40 E. Maintenance on CW and CW+year:

“Manipulation that was performed between December 23, 1985, and November 28, 1990, that caused an area to become a CW may be maintained to the scope and effect of the original manipulation. Subsequent manipulation that exceeds the original scope and effect will cause the affected area to become a CW+year under the Act, and the person may be ineligible for USDA benefits unless an exemption applies. Production of an agricultural commodity on the CW will also result in ineligibility for USDA program benefits for that crop year.”

12. Regarding CWTE: my understanding is that CWTE is used when a person takes action based on a non-certified determination. Not a certified wetland determination as it is my understanding that those cannot be changed without written request from owner/operator.

CWTE could be granted on a certified wetland determination found to be in error, as granting the exemption would be a decision in the producer’s favor (i.e. not adverse.) Per the Appeals regulations at 7 CFR §614.5 Reservation of authority:

The Secretary of Agriculture, Chief of NRCS, if applicable, or designee, reserves the right to make a determination at any time on any question arising under the programs covered under this regulation within their respective authority, including reversing or modifying in writing, with sufficient reason given therefore, any program decision or technical determination made by an NRCS official.

Also, policy in NFSAM 519.1 allows for erroneous determinations found during a quality assurance review to be changed, with notification and appeal rights provided to affected parties.

13. If it still ponds for almost 7 days, it would seem the drainage effort was not very effective.

It depends on the location and the climate at that location. In some locations some drainage efforts completely remove hydrology and in other areas the same efforts do not. Seven days of ponding can be a “duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions” as required to meet the hydrology criterion for wetland under the Food Security Act in some locations. PC areas may or may not meet wetland criteria. FW and FWP do meet wetland criteria.

14. Do you go entirely on the soils map lines?

Not entirely, but soil map lines and hydric soil lists can be used to determine the hydric soil factor is met. The decision if the site is a Food Security Act wetland is ultimately rendered based on the determination of a presence or absence of each of the three factors under Normal Circumstances (NC.) Areas determined to support wetland hydrology, a prevalence of hydrophytic vegetation, and a predominance of hydric soils (all under NC), as each factor is defined by the Food Security Act, are wetlands subject to the WC provisions of the act. Per the Procedures in NFSAM 514.8 A., Variance (5-18):

For some sampling units, a soil survey may be sufficient to determine that the site supports a predominance of hydric soils. This use of soils mapping and hydric soils lists is supported by regulation (7 CFR section 12.3 l(a)) as the sole indicator for a determination of a predominance of hydric soils.

In the example where a pond was excavated partially in hydric soils (wetland) and partially in upland, non-hydric soils, the soils line was used to distinguish between WX and AW. The portion of the pond excavated in in the wetland. The AW area constructed in uplands was not historically wetland per the soils mapping, and only exhibits wetland criteria now due to the influence of human activities.

15. What if installation of the stock water pit results in drainage on the periphery of a pre-existing wetland?

That could be a violation if production of an agricultural commodity was made possible on the pre-existing wetland after 11/28/1990. Per NFSAM 514.2 Definitions:

G. Manipulation .- The alterations that are considered manipulation may result from dams, dikes, ditches, diversions, subsurface drains, pumps, terraces, or dredge and fill. These measures may alter hydrology even if installed offsite from the effected wetlands.

16. I always thought FW needed to be closed depressions greater than 1-2 feet

Closed depressions greater than 1-2 feet is not mentioned in the definition of FW in the regulations or NFSAM. It could be part of your State’s guidance on using offsite methods (SOSM) to make wetland determinations.

17. Why would the ditch labeled as WX not be labeled as NW for "other waters"?

18. All ditches are not necessarily WX, correct? Some are pretty intermittent.

21. WX on ditches is confusing to me. I thought the definition of 'NW' covers areas that would be considered 'other waters of US.'

The WX used for the ditch in the scenario on Slides 54-55 is specific to the scenario. You are all correct that WX is not used for all ditches, but neither is NW or AW – if only the labels were so simple! In the scenario, WX is correct because the ditch meets all 3 wetland criteria, it has been manipulated by excavating it on hydric soils, but production was not intended in the ditch and was not made possible in

the ditch. NW would be appropriate if the ditch was constructed in hydric soils but did not support hydrophytic vegetation due to depth of water or velocity of flow. AW would be appropriate for ditches constructed entirely in uplands that now met all 3 wetland criteria. And as I mentioned, if the ditch is not within the field boundaries where FSA has indicated a wetland determination is needed, it is not necessary to label it at all.

19. Just to clarify - CWs can be restored and used for grazing but not hay?

A CW (converted between 12/23/1985 and 11/28/1990) does not have to be restored for a producer to be eligible for USDA benefits, but a CW+Year (converted after 11/28/1990) does. A CW that is restored reverts to the label it had or would have had before the conversion. Planting or producing an agricultural commodity or mechanical harvest of hay on a CW results in ineligibility, but CW can be maintained and used for grazing without loss of eligibility. See NFSAM 514.40, especially E. and F. and the table under 514.60 Uses and Maintenance.

20. Can you talk more about the definition of the label CWTA?

See NFSAM 514.70 for more on CWTA. The definition is below.

514.70 Timely Evaluation of Wetland Certifications due to the Agricultural Act of 2014, Converted Wetland Timely Assistance (CWTA)

A. Definitions

(1) The Food Security Act of 1985, as amended, provides that USDA will evaluate wetland compliance determination requests from Federal crop insurance program subsidy participants in a timely manner. Converted wetland timely assistance (CWTA) are wetlands converted when NRCS does not conduct the evaluation of a compliance certification in a timely manner. When the wetland determination is not conducted in a timely manner, the participant maintains eligibility for Federal crop insurance premium subsidies regardless of whether they are in compliance. This exemption remains with the land and applies to participants requesting Federal crop insurance subsidy benefits only.

(2) The timely assistance period is defined as receiving a preliminary determination within 12 months from the date that a request for a determination is received by NRCS. Exceptions may apply if the required evaluation is delayed due to unfavorable site conditions for the evaluation of soils, hydrology, or vegetation. When the State Conservationist (STC) determines an exception is warranted, the STC, or delegated official, will notify the participant in writing clearly identifying the basis for the exception.

22. What is the definition of maintenance as it relates to FWs and FWPs?

See NFSAM 516.10 Definitions:

B. Maintenance of Hydrologic Manipulations

Maintenance of hydrologic manipulations refers to the repair, rehabilitation, or replacement of the capacity of existing systems to allow for the continued use of wetlands currently in agricultural production, and the continued management of other areas as they were used on or before December 23, 1985. This allows a person to reconstruct or maintain the capacity of the original system or install a replacement system that is more durable or will result in lower maintenance or costs.

C. Hydrologic Manipulation

Hydrologic manipulations are alterations that remove water, divert water, or otherwise affect hydrology on wetlands. Manipulations may include any of the following:

- (i) Dams
- (ii) Dikes

- (iii) Ditches
- (iv) Diversions
- (v) Subsurface drains (tile)
- (vi) Pumps
- (vii) Terraces
- (vii) Fill
- (viii) Excavation and/or
- (ix) Deep ripping of a restrictive layer

Maintenance would also include preventing any woody vegetation and stumps cleared prior to 12/23/1985 from returning on FW or FWP such that the area did not meet the definition of Abandonment. See answer to question 6 for the definition of abandonment.

23. What if a producer clears an orchard, plants a commodity crop for a couple years and then intends to plant the field back to orchard. Hydric soils are present but no previously certified determination on file.

Again, not enough information is provided in the question for me to provide a definite answer, but I believe you are asking whether the situation you describe would qualify for a WX label. If the orchard was manipulated before 12/23/1985 such that hydrology was removed, but a commodity crop was not planted or produced before 12/23/1985, the label would be NW and it would not matter what was produced on the area later. If the area simply had woody vegetation removed and you still have hydrology and hydric soils, and a new orchard has not yet been planted such that production of a commodity crop is still possible, the label would be CW+year because an ag commodity was produced for a couple of years. See the Definition and Maintenance of WX in NFSAM 514.11 (A) and (D).

24. When would deep water habitat not meet 7 CFR 12.6 (c) (8)?

When it did not meet the Food Security Act definition of wetland, which would usually be because the water was too deep to support a prevalence of hydrophytic vegetation.

25. A cranberry bog that was created prior to 1985 would get a WX label. If an owner wants to convert it to grow a tilled crop, would this become a CW?

Yes. Per NFSAM 514.11:

D. Maintenance

WX can be maintained but not for the purpose of, or making possible production of, an agricultural commodity. To ensure compliance, a participant can complete Form AD-1026, Highly Erodible Land and Wetland Conservation Certification, before conducting any hydrologic manipulation to ensure that the proposed manipulation is not for the purpose of, and does not make production of, an agricultural commodity possible on the WX or another wetland.

and 514.11 A. Definition

(2) Manipulated wetlands may or may not meet wetland criteria, depending on the type and degree of manipulation. If production is later made possible or an agricultural commodity crop is produced on the manipulated wetland, the area will be labeled a converted wetland (CW or CW+ year)....

26. If a utility company converted a wetland, would that count as a Third Party Conversion?

FSA is responsible for determining whether the party who converts a wetland is a third party. (7 CFR Section 12.6(b)(3)(v-u))

Per NFSAM 514.42 C. Conversions by Drainage Districts or Similar Entities

The regulations (7 CFR Section 12.5(b)(l)(vii)(D)) specify that activities of an entity of local government, such as a water resource district, drainage district, or local road authorities, will be attributed to all persons within the jurisdiction of the district or other entity who are assessed for the activities of the district or entity. Accordingly, where a person's wetland is converted due to the actions of the district or entity, the person shall be considered to have caused or permitted the drainage. However, the activities of a drainage district or other entity will not be attributed to a person to the extent that the activities of the district or entity were beyond the control of the person, and the wetland converted is not used by the person for the production of an agricultural commodity or a forage crop for harvest by mechanical means. Wetlands converted by a drainage district or similar entity will be labeled CW.

27. On the PC - if hadn't been farmed for quite a while wouldn't it be abandoned and could then be determined W?

Not if there was a certified wetland determination of PC. Per regulations at 7 CFR Part 12.5:

(b) *Exemptions for wetlands and converted wetlands*—(1) *General exemptions*. A person shall not be determined to be ineligible for program benefits under §12.4 as the result of the production of an agricultural commodity on converted wetland or the conversion of wetland if:

- (i) The land is a prior-converted cropland and meets the definition of a prior-converted cropland as of the date of a wetland determination by NRCS;
- (ii) The land has been determined by NRCS to be a prior-converted cropland and such determination has been certified, and NRCS determines that the wetland characteristics returned after the date of the wetland certification as a result of—
 - (A) The lack of maintenance of drainage, dikes, levees, or similar structures,
 - (B) The lack of management of the lands containing the wetland, or
 - (C) Circumstances beyond the control of the person

Policy in NFSAM 514.33 A.(2) puts it this way: "PC land will not be considered abandoned under the Food Security Act."

Or, as we say colloquially, "once a PC, always a PC."

However, if the land use is changed and wetland criteria return, the Corps of Engineers may consider a PC jurisdictional waters of the US for Clean Water Act purposes.

28. On PC I believe the definition requires that as of 12/23/85 the site does not support woody vegetation

Yes, that is correct, I did not repeat that requirement under every scenario. See Notes for Slide 25 and NFSAM 514.30.

29. I'm confused with the "NW" playa example. Can that field be cropped?

Yes. See the definition of NW on Slide 22, bullet 2 and NFSAM 514.20. The portion of the playa that has hydric soils (i.e. was historically a playa wetland) but was drained by the pit pond such that wetland hydrology was removed prior to 12/23/1985, and a commodity crop was not produced meets the definition of NW. If a commodity crop had been produced prior to 12/23/1985, it would be a PC. Per the

table under 514.60, there are no restrictions on NW unless manipulation would convert adjacent wetlands.